IN THE

# Supreme Court of the United States

**October Term, 1978**

**No. 78-414**

UNITED AIR LINES, INC.,

*Petitioner,*

*vs.*

STATE HUMAN RIGHTS APPEAL BOARD AND STATE DIVISION OF HUMAN RIGHTS ON THE COMPLAINTS OF LINDA MORTIMER AND MIROSLAWA ROSENFELD,

*Respondents.*

## BRIEF FOR RESPONDENT STATE DIVISION OF HUMAN RIGHTS IN OPPOSITION

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## BRIEF FOR RESPONDENT STATE DIVISION OF HUMAN RIGHTS IN OPPOSITION

### Question Presented

In view of the provisions in the Civil Rights Act of 1964 which preserve State fair employment legislation providing more comprehensive protection to employees than what is afforded by Title VII, does the Supremacy Clause or the Commerce Clause invalidate a decision of the New York Court of Appeals letting stand a decision of the Appellate Division* requiring petitioner to stop compelling New York-based flight attendants who become pregnant to take unpaid leave immediately upon notification of pregnancy?

* *United Air Lines, Inc.* v. *State Human Rights Appeal Board*, 61 App.Div.2d 1010, 420 N.Y.S.2d 630 (2d Dept. 1978), *appeal denied*, 44 N.Y.2d 641, —— N.E.2d ——.

## Statement of the Case

Petitioner would have this Court review application of New York's fair employment legislation, N.Y. Executive Law Art. 15 (McKinney's 1972), hereinafter "the Human Rights Law", to an interstate air carrier which compels flight attendants to take unpaid leave immediately upon notification of pregnancy.

After investigation and public hearings under the Human Rights Law, the State Division of Human Rights issued orders finding petitioner's practice discriminatory as to sex, except with respect to flight attendants more than 27 weeks pregnant. The Division's orders (1) require petitioner to allow any pregnant flight attendant to work until the 20th week of pregnancy upon the certification by her physician that such employment is not a hazard to health or safety; (2) permit petitioner, after medical examination by its own physician, to disqualify from flight duty a flight attendant who is 20-28 weeks pregnant, if such examination shows she can no longer perform her duties without risk to her health or to the safety of passengers and crew; and (3) permit petitioner to disqualify from flight duty any flight attendant who is more than 27 weeks pregnant.

Although the Civil Rights Act of 1964, 78 Stat. 241, 42 U.S.C. §§2000a *et seq.*, recognizes and preserves State fair employment legislation providing more comprehensive protection to employees, petitioner perceives a conflict with Title VII, 42 U.S.C. §§2000e-1 *et seq.*, and decisions thereunder, and perceives that conflict to be sufficient to raise a question under the Commerce and Supremacy Clauses, U.S. Const. Art. I, §8 cl.3, Art. VI cl.2.



The Division respectfully submits, for the reasons set forth below, that petitioner does not raise a substantial Federal question warranting certiorari.

## Reasons Certiorari Should Be Denied

### I. Petitioner raises no substantial question under the Supremacy Clause.

Petitioner relies on *Condit* v. *United Air Lines, Inc.*, 13 FEP Cases 689 (E.D. Va. 1976), *aff'd*, 558 F.2d 1176 (4th Cir. 1977), *cert. denied*, —— U.S. ——, 97 S.Ct. 1510, 55 L.Ed.2d 531 (1978), to justify its petition to this Court. *Condit* holds that petitioner's compulsory maternity leave rule is permissible under Title VII. *Contra*: *MacLennan* v. *American Airlines, Inc.*, 440 F. Supp. 466 (E.D. Va. 1977), *appeal pending; In re Nat. Airlines, Inc.*, 434 F. Supp. 249 (S.D. Fla. 1977).

*Condit* does not adjudicate the question whether that rule is required by the Federal Aviation Act, 72 Stat. 731, as amended, 49 U.S.C. §§1301 *et seq.*, or whether pregnancy as such on the part of a flight attendant constitutes a risk to safety in flight. *Condit* does not refute the Division's findings (Petition at A5, A14) that the Federal Aviation Administration, instead of requiring categorical exclusion of pregnant flight attendants from flight duty, suggests that the question of their fitness to work be determined case by case.*

It is just this process of determination case by case which the Division's orders permit and provide. Petitioner

* A similar conclusion was reached in *Burwell* v. *Eastern Airlines, Inc.*, Civ. No. 74-0418-R (E.D. Va. September 6, 1978).

need not retain on flight duty any flight attendant whose pregnancy has been medically certified to be disabling or to constitute a risk to safety. What the Division's orders forbid is wholesale exclusion based on pregnancy as such and nothing more.

Interpretation of Title VII does not always control interpretation of the Human Rights Law. *Brooklyn Union Gas Co.* v. *State Human Rights Appeal Board*, 41 N.Y.2d 84, 359 N.E.2d 393 (1976). Title VII not only recognizes and preserves State fair employment legislation, but permits such legislation to provide more protection, and more stringent sanctions, than Title VII itself. When the State statute permits what Title VII prohibits, there is conflict, and Title VII will supersede. 42 U.S.C. §200h-4. But when the State statute prohibits what Title VII permits, there is no conflict, no supersedure, no question under the Supremacy Clause. See *Thomas Publishing Co.* v. *State Div. of Human Rights*, —— F. Supp. ——, No. 77 Civ. 3290 (S.D.N.Y. September 19, 1978). States remain free, after as before enactment of Title VII, "to extend the area of non-discrimination beyond that which the Constitution itself exacts", Frankfurter, J., concurring, in *Railway Mail Association* v. *Corsi*, 326 U.S. 88, 98 (1945).

## II. Petitioner raises no substantial question under the Commerce Clause.

Petitioner asserts that the decisions and administrative orders below create an undue burden on interstate commerce "by intruding into an area in which uniformity of operation on a nationwide basis is essential." Petition at 10. Petitioner overlooks the uniformity which could be



achieved by complying with those decisions and orders, and observing and giving effect to them nationwide. Neither Title VII nor the Federal Aviation Act stands in the way of such compliance. See *MacLennan* v. *American Airlines, Inc., supra; In re Nat. Airlines, Inc., supra; Burwell* v. *Eastern Airlines, supra.* The air carriers themselves are not uniform in their practices governing pregnant flight attendants. Variations between Federal, State and local prohibitions against discrimination do not create an unconstitutional burden. *Colorado Anti-discrimination Comm.* v. *Continental Air Lines*, 372 U.S. 714, 83 S. Ct. 1022, 10 L.Ed.2d 84 (1963). Implicit in the provisions of the Civil Rights Act of 1964 recognizing and preserving State and local fair employment legislation and deferring to the jurisdiction and remedial power of agencies enforcing such legislation, 42 U.S.C. §§2000e-4(f)(i), 2000e-5(b)-(e), 2000e-7, 2000e-8(b), 2000h-4, is a Congressional finding that application of such legislation to employers in interstate commerce imposes no undue burden.

The insubstantiality of petitioner's question under the Commerce Clause is clear from the fact that petitioner did not raise it before the Division or on appeal to the State Human Rights Appeal Board, and did not regard it as an appropriate basis for an appeal to the New York Court of Appeals as of right pursuant to N.Y. Civil Practice Law and Rules §5601(b) (McKinney's 1963 and Supp.).

## Conclusion

**For the foregoing reasons, the petition for a writ of certiorari should be denied.**

Dated: New York, N.Y.
October 30, 1978

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